A **YEOH ENG KONG v. DATO' NIK ISMAIL NIK YUSOFF & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[SUIT NO: WA-22NCC-175-05-2016]
19 JULY 2016

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COMPANY LAW: *Receivership – Appointment of receiver and manager – Application for – Claim against directors of company – Breach of statutory duties, fiduciary duties, conspiracy to defraud and inducement to breach representation to shareholders of company – Grounds of application – To preserve status of company from being delisted – Whether possible loss of listing status justified appointment of receiver and manager over entire undertaking and assets of company*

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The plaintiff was a director and a substantial shareholder of SCAN Associates Berhad ('ninth defendant'), a company listed on the ACE Market of Bursa Malaysia Securities Berhad, and was the ninth defendant herein. The ninth defendant company had been classified as a GN3 company by the Bursa Malaysia pursuant to Guidance Note 3 of the ACE Market Listing Requirements of Bursa Securities. It was not disputed that if the ninth defendant remained to be a GN3 company and failed to secure an approved regularisation plan, its shares risked being delisted by Bursa Malaysia Bhd from the official list of the stock exchange. The plaintiff contended, among others, that the defendants had been involved in misrepresentation and deceit against the shareholders of the ninth defendant company which included concealing the actual state of the latter's financial health, particularly *vis-a-vis* its classification as a GN3 company. The plaintiff claimed to have relied on representations made by the defendants, and had bought substantial stakes in the ninth defendant company. The plaintiff also claimed that the defendants had violated their statutory and fiduciary duties, and further, conspired to defraud the shareholders and investors which caused losses to them. It was the plaintiff's contention that the defendants conspired to ensure that the shares of the ninth defendant company get delisted. Therefore, *vide* encl. 3, the plaintiff sought an *ex parte* order for the appointment of a receiver and manager, and for an *ad interim* injunction order for an extraordinary general meeting ('EGM') of the ninth defendant company be convened for the shareholders to deliberate on the proposed regularisation plan, and to compel the board of directors to apply for an extension of time from Bursa Malaysia to enable the proposed regularisation plan be submitted to the stock exchange. The plaintiff also applied for an *ad interim* appointment of a receiver and manager *vide* encl. 15.

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Held (dismissing encls. 3 and 15 with costs):

(1) In any application for the appointment of receiver and manager, and any injunction application ancillary thereto, the property sought to be preserved must be in jeopardy and thus required preservation. The property over which the receiver and manager are appointed must be identified and described in the order itself or by reference to the pleadings or documents where details of the property are set out. Enclosure 3 made reference to two points of relevance: (i) the receiver was proposed to be appointed over the entire undertakings and assets of the ninth defendant company; and (ii) the ground stated in encl. 3 to support such application was almost unmistakably wholly concerning the need to preserve only the listing status of the ninth defendant company. This was wholly disproportionate, if not patently irreconcilable. A possible loss of listing status could not justify the appointment of a receiver and manager over the entire undertaking and assets of the ninth defendant company. (paras 36 & 37)

(2) The 'property' said to be in jeopardy by the plaintiff was resolutely the preservation of the listing status of the ninth defendant. The affidavits and pleadings by the plaintiff had not identified any other property of the ninth defendant that was in any manner similarly in jeopardy, either at the risk of being dissipated or destroyed. A listing status could not be construed as a property of the listed issuer company or its shareholders. And is certainly not one which risk of delisting justifies the appointment of a receiver and manager. Therefore, the purported asset of the ninth defendant that allegedly needed protection was not an asset owned by the company as recognised by law, or in any event, not a form of 'property' that could justify the entry of a receiver and manager over the entire assets and undertaking of a company. The plaintiff has not shown what was the property in jeopardy to justify the order for the appointment of a receiver and manager. The very basis and rationale for the application of the appointment of a receiver and manager and consequently the other reliefs related thereto, must therefore necessarily fail. (paras 39, 46 & 52)

(3) The very nature of the application to appoint a receiver and manager in the instant case was manifestly interim, and was designed to maintain the *status quo* of certain assets pending the hearing of the underlying action. In such a situation, there must be a substantive connection between the property sought to be preserved in the receiver application and the reliefs prayed for in the main action. Enclosure 3 spoke much of the need to protect the listing status as the *raison d'etre* of the proposed appointment. The statement of claim of the plaintiff, on the other hand, however focused on the alleged wrongdoing of mainly the director

defendants in the form of deceit, misrepresentation, conspiracy and breach of fiduciary and statutory duties. Consequently, therefore, the reliefs claimed by the plaintiff include declarations on the various alleged violations and for damages. They did not, however, include any relief against the ninth defendant company. Preserving the listing status had little to do with proving the claims of the plaintiff against the other defendants. The receiver application did not raise a sufficient basis to establish the requisite nexus with the writ action. (paras 53, 54 & 55)

(4) The plaintiff had no *prima facie* claim on the title of the property of the ninth defendant because the former was clearly not, in actual fact, seeking any form of final relief against the latter. It was not making any claim against the asset of the ninth defendant. Thus, the plaintiff failed to satisfy the test for the granting of the order of an appointment of receiver and manager. (para 56)

(5) The principal relief prayed for by the plaintiff was damages. This was unsurprising since the dispute was essentially concerning shareholding and the purported threat of loss of value in relation to the alleged mismanagement and possible delisting. In the circumstances, damages should rightfully be considered as an adequate remedy. This fortified the challenge against the order for the appointment of a receiver and manager on the basis that since such appointment being an equitable remedy, and as damages were adequate, the court would not be readily moved to exercise its jurisdiction to grant such remedies. (para 57)

(6) The plaintiff would not be in a worse off position if the appointment was delayed, such as if the shares got delisted, because delisted shares were devoid of only stock market ready price tradability and not render them worthless. The fact that shares are quantifiable further suggests damages are measurable and ought therefore to be adequate. There was no allegation that the defendants were incapable financially of paying damages if so ordered. Therefore, the application for the appointment of a receiver and manager, on *ex parte* basis in respect of encl. 3 in the first application and on *ad interim* basis in encl. 15 in the second application were entirely bereft of merit and could not be sustained. (para 58)

(7) There was insufficient evidence of mismanagement or threat to the property of the ninth defendant to justify the appointment of a receiver and manager. The evidence also did not satisfy the test for the appointment of a receiver and manager, nor in any event justified the management powers statutorily vested in the directors to be displaced by the appointment of a receiver and manager over the entire undertaking of the ninth defendant company, more so on the pretext of retaining the

listing status which was not even a property of the ninth defendant to start with, and worse still at the same time interfering with a decision of a functioning Board which could be legitimately characterised as a business judgment, and thus ought rightfully to be protected under the law. (para 99)

Case(s) referred to:

Australian Securities and Investments Commission v. Rich [2009] NSWSC 1229 ***(refd)***
Bond Brewing Holdings Ltd v. National Australian Bank Ltd [1990] 8 ACLC 330 ***(refd)***
Dato' Oon Ah Baa & Ors v. Eagle & Pagoda Brand Teck Aun Medical Factory & Ors [2003] 7 CLJ 81 HC ***(refd)***
Federal Transport Service Co Ltd v. Abdul Malik & Ors [1973] 1 LNS 28 HC ***(refd)***
Gibb & Co v. Malaysia Building Society Bhd [1982] 1 CLJ 185; [1982] CLJ (Rep) 99 FC ***(refd)***
Ho Chee Kheong & Anor v. Megaleap Development Sdn Bhd & Ors [2011] 2 CLJ 835 HC ***(refd)***
Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821 ***(refd)***
Jenkins v. Enterprise Gold Mines NL and Another [1992] 6 ACSR 539 ***(refd)***
Lim Poh Choo v. Absolute Ascend Sdn Bhd [2008] 7 CLJ 810 HC ***(refd)***
Luck Continent Ltd v. Cheng Chee Tock Theodore & Ors [2013] 5 HKC 442 ***(refd)***
Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 1 LNS 42 HC ***(refd)***
Moss Steamship Co Ltd v. Whinney [1912] AC 254 ***(refd)***
Ng Yong Long v. Qua Hock Leong [2006] 1 LNS 195 HC ***(refd)***
Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals [2012] 5 CLJ 169 CA ***(refd)***
Re Rhine Holdings Ltd (in liq) [2000] 3 HKC 543 ***(refd)***
Saling Lau Bee Chiang v. Kanawagi Seperumaniam [2010] 8 CLJ 347 HC ***(refd)***
Sek Ann Thong v. Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor [1997] 1 CLJ Supp 239 HC ***(refd)***
Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(refd)***
United Engineers (M) Bhd v. Seow Boon Cheng & Anor [2001] 6 CLJ 190 HC ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 212, 369
Companies Act 1965, ss. 131B, 132(1), (1B), (1C), (1D), (6)
Courts of Judicature Act 1964, s. 25(2)
Rules of Court 2012, O. 30 r. 1(1), (2), (3), (4)
Rules of the High Court 1980, O. 30 r. 1(4)

For the plaintiff - Izral Khairy & Tharminder Singh; M/s Izral Partnership
For the 2nd, 6th, 7th & 9th defendants - LM Chong & Rachel Lim; M/s Lim Chong Phang & Amy
For the 4th defendant - Alex Tan; M/s Wong Kian Kheong
For the 10th defendant - Jeff Ong; M/s Cheah Teh & Su

Reported by Sandra Gabriel

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JUDGMENT

Mohd Nazlan Ghazali JC:

(1) Ex parte Receiver And Manager Appointment/Ad-interim Injunction (encl. 3)

(2) Ad-interim Receiver And Manager Appointment (encl. 15)

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Introduction

[1] This is a matter which involves two similar applications filed by the plaintiff, both essentially for an interim order for the appointment of a receiver and manager over the assets of the ninth defendant company. I dismissed the first at the end of the hearing upon a certificate of urgency, on 17 May 2016 ("the first application") and again refused a substantially similar application filed on the basis of a new development, at the conclusion of submissions by counsel at a hearing on 26 May 2016 ("the second application"). This judgment contains the full grounds for both decisions on these applications.

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Key Background Facts

The Parties

[2] The plaintiff is a director and at the time of the filing of the writ and statement of claim was a substantial shareholder (of about 7.791% of the share capital) of SCAN Associates Berhad, a company involved in the business of providing information and communication technology security solutions, listed on the ACE Market of Bursa Malaysia Securities Berhad, and is the ninth defendant herein. The ninth defendant company had been classified as a GN3 Company by the Bursa Malaysia pursuant to Guidance Note 3 ("GN3") of the ACE Market Listing Requirements of Bursa Securities. It is not disputed that if the ninth defendant remained to be a GN3 Company and failed to secure an approved regularisation plan, its shares risked being delisted by Bursa Malaysia Bhd ("Bursa Malaysia") from the official list of the stock exchange.

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[3] Dato' Nik Ismail bin Nik Yusoff is the first defendant. He was, at all material times relevant to the main action, the chairman of the ninth defendant, until the motion to re-elect him as director was withdrawn at the adjourned annual general meeting on 15 January 2016. Mejar Ismail bin Ahmad, the second defendant, is the present chairman. Dato' Dr Norbik Bashah bin Idris, the third defendant, resigned as a director on 30 June 2015, but was reappointed on 15 January 2016. The fourth defendant, Mak Siew Wei, an executive director, was appointed executive deputy chairman on 19 January 2016. He also has a substantial shareholding of about 6.19% in the ninth defendant company.

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[4] The fifth defendant, Dato' Nasri bin Nasrun resigned as director on 13 March 2015. The sixth defendant, Teh Chee Hoe was appointed executive director and group chief executive officer on 19 January 2016. The seventh defendant, Chong Khing Chung was appointed a director on 5 February 2016. The eight defendant, Roy Winston George was appointed a director on 13 June 2015 but ceased to be one upon the motion to re-elect him as director, just like for the first defendant, being withdrawn at the adjourned annual general meeting on 15 January 2016. Messrs Baker Tilly Monteiro Heng, the tenth defendant, is the auditor of the ninth defendant company.

Actual Requests In The First And Second Applications

[5] At the outset, I should make it clear that in the first application, the plaintiff sought an *ex parte* order for the appointment of a receiver and manager, and for an *ad interim* injunction order for an extraordinary general meeting ("EGM") of the ninth defendant company be convened for the shareholders to deliberate on the proposed regularisation plan, and to compel the Board of Directors to apply for an extension of time from Bursa Malaysia to enable the proposed regularisation plan be submitted to the stock exchange. In the second application, the plaintiff asked for an *ad interim* appointment of a receiver and manager, and failing which, an *Erinford* injunction. I refused all requests made by the plaintiff in the first and the second applications, at the conclusion of the hearings on 17 May 2016 and 26 May 2016 respectively.

The Underlying Main Action

[6] In summary, in the underlying action, as set out in his statement of claim, the plaintiff is principally contending, among others, that under the influence of or aligned with the fourth defendant, relevant defendants had, at different times, been involved in misrepresentation and deceit against the shareholders of the ninth defendant company in concealing the actual state of the latter's financial health, including particularly *vis-a-vis* its classification as an GN3 Company. The plaintiff claimed to have relied on representations made by the relevant director defendants and especially the fourth defendant, and had bought substantial stake in the ninth defendant company as a result. The plaintiff also claimed that the relevant former director defendants had thus violated their statutory and fiduciary duties, and that further, together with the auditors being the tenth defendant, they had also thereby conspired to defraud the shareholders and investors, and caused loss to them.

[7] The plaintiff therefore pleaded for various reliefs, which include declarations against the relevant directors on their alleged conspiracy to defraud and injure; for damages as a consequence thereof; for orders for the removal of the present directors and for an EGM to be called to appoint new ones in replacement; for declarations specific to the fourth defendant, namely in relation to his alleged violation of securities laws; as well as for aggravated and exemplary damages.

[8] Most pertinent to the present applications which are dealt with in this judgment however, is the pleading by the plaintiff that the current director defendants are conspiring to ensure that the shares of the ninth defendant company get delisted. The significance and urgency of the matter was due to the fact that 18 May 2016 was the deadline for the ninth defendant company to make a submission of its regularisation plan to Bursa Malaysia, in order to prevent a delisting of its shares. Thus in encl. 3 for the first application, which was filed on 12 May 2016, one day after the filing of the writ and the statement of claim, the plaintiff seeks to appoint a receiver and manager over the ninth defendant company.

[9] Pending the hearing proper of the said encl. 3 *inter partes*, the plaintiff sought by way of a certificate of urgency, an *ex parte* order for the said appointment of the receiver and manager. I fixed the matter to be heard on 17 May 2016 but had directed that the defendants be notified of that hearing to enable them to be present in the proceedings. After all, if granted, the order would have to be served on and implemented by the directors of the ninth defendant company.

[10] Counsel for most of the defendants did appear at the hearing on 17 May 2016. I do not consider the hearing to be *inter partes* in nature but proceeded instead on an *ex parte* basis with notice to the defendants, not unlike the situation in the High Court case of *Dato' Oon Ah Baa & Ors v. Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors* [2003] 7 CLJ 81, *albeit* concerning an *ex parte* application for leave to file contempt proceedings.

[11] At the hearing of the first application on 17 May 2016, directions for the exchange of affidavits for the *inter partes* hearing were thus made at the end of the proceedings. Counsel for the plaintiff requested for an *ad ex parte* order for the appointment of receiver and manager given what they contended to be the urgency of the matter concerning the possible delisting of the ninth defendant company. I then invited counsel for parties to submit on the basis of what had been averred by the plaintiff, but more particularly on points of law pertinent to the said request.

Prelude To The First Application

[12] According to the plaintiff, on 12 April 2016, Mercury Securities Sdn Bhd ("Mercury") – the sponsor or professional adviser of the ninth defendant company, had sent a letter to the latter, reminding that the ninth defendant company only had approximately one month left to submit the requisite regularisation plan to the stock exchange, and also requested the present Board to update them on the ninth defendant company's intended course of action. Soon after, on 18 April 2016, Revenue Harvest Sdn Bhd ("Revenue Harvest") (being a purported "white knight")'s indicative offer letter dated

16 April 2016 was circulated to the present Board. The same was discussed the day after at a Board meeting on 19 April 2016, where the Board was also given details of another potential white knight under the code name Project Laser.

[13] The day after, on 20 April 2016, the third and sixth defendants, the plaintiff and the chief financial officer of the ninth defendant attended a presentation at Revenue Harvest's head office and signed a Non-Disclosure Agreement with Revenue Harvest to enable the ninth defendant to first conduct the relevant due diligence exercise. On 22 April 2016 Revenue Harvest forwarded a letter containing what the plaintiff considered to be details of the proposed regularisation plan, as well as audited accounts for its financial years 2014 and 2015 to the Board of the ninth defendant.

[14] On 26 April 2016 the directors had another Board meeting and deliberated on the proposals from Revenue Harvest and Project Laser respectively. The plaintiff asserted that the Board had then unanimously agreed to accept Revenue Harvest's proposal, as a result of which the sixth defendant on 26 April 2016 executed the acceptance letter for and on behalf of the ninth defendant company to Revenue Harvest's proposal. The draft letter seeking an extension of time to Bursa Malaysia ("the extension letter") was subsequently on 3 May 2016 circulated to the Board members.

[15] The plaintiff claimed that on that same day, the fourth defendant responded to the draft, stating that more details of the professional fees and costs for the proposed regularisation plan would be necessary before the extension letter could be signed. On 3 May 2016 and 4 May 2016 the plaintiff sent e-mails to the Board members, reiterating the urgency of the submission of the extension letter.

[16] Given the absence of any response, the plaintiff on 5 May 2016 again e-mailed the directors of the Board, this time expressing his dissatisfaction over what he deemed to be the Board's lack of urgency in the treatment of the extension letter. On that same day on 5 May 2016, the fourth defendant gave a reply to the plaintiff, claiming that the ninth defendant did not have the financial means to pay the costs of the proposed regularisation plan. In the plaintiff's view, this side stepped the real issue of the urgent need for the extension letter. Mercury too, on that same day, sent a reminder to the ninth defendant of the imminent deadline of 18 May 2016.

[17] On 10 May 2016, the sixth defendant (also the Group CEO) stated that the ninth defendant was not in a financial position to pay for the costs related to the proposed regularisation plan. This then witnessed a response from the plaintiff who on 11 May 2016 sent an e-mail to the Board members making clear his position against the board's refusal to obtain an extension of time from Bursa Malaysia and to proceed with the proposed regularisation plan.

A On that same day, the plaintiff filed the writ and the statement of claim. On 16 May 2016 the plaintiff instructed his solicitors to send on his behalf his letter/application to Bursa Malaysia requesting for the extension of time.

Terms Of R&M Appointment In encl. 3

B **[18]** It is important that I set out the essence of what the plaintiff sought to achieve from this court in his encl. 3. First, Dato' Adam Primus Varghese bin Abdullah, a chartered accountant, be appointed a receiver and manager over the entire undertakings and assets of the ninth defendant company, and to manage the same. Secondly, specific directions be given on the powers of the receiver and manager as were detailed in the accompanying Schedule A C which basically sets out the extensive powers associated in managing a company, including in particular in resolving the regularisation plan and avoiding the delisting of the ninth defendant company. Thirdly, the defendants and their agents and servants are to be ordered to furnish all information concerning the ninth defendant company to the receiver and D manager. Fourthly, the ninth defendant shall be responsible for paying the costs of the receiver and manager, who shall also be indemnified by the defendants against any liability arising from properly carrying out his powers. Fifthly and significantly, further and/or in the alternative, pending the disposal of the said encl. 3, the defendants and their servants and agents E be restrained by way of an injunction from managing the affairs of the ninth defendant.

[19] It is clear that from what was further expressly stated in encl. 3 that the grounds in support of the application for the appointment of receiver and manager essentially revolve around the wish to avoid the delisting of the F shares of the ninth defendant. It was said to be in the interest of all shareholders of the ninth defendant that a receiver and manager be appointed to preserve the listing status and *status quo* of the ninth defendant company pending the disposal of the plaintiff's suit against the defendants.

G **Prelude To The Second Application**

[20] These substantially similar all-encompassing and widely drafted orders and the same grounds in support as contained in encl. 3 were repeated in the plaintiff's second application to have a receiver and manager appointed on an *ad interim* basis, as documented in encl. 15. The only difference, or H what the plaintiff considered to be a further development justifying this court to revisit the same issue was the fact that following the failure on the part of the ninth defendant to submit a regularisation plan to Bursa Malaysia by the stipulated deadline of 18 May 2016, the stock exchange has since commenced the delisting process against the ninth defendant, and it was made clear by the stock exchange that the shares would be delisted on I 31 May 2016 unless an appeal against delisting was lodged with Bursa

Malaysia by 26 May 2016. The plaintiff contended that if not appealed against, and delisting occurred, all the shares of the ninth defendant company would be rendered worthless.

[21] On 17 May 2016, the day I refused the request for *ex parte* order on the appointment of the receiver and manager and the *ad interim* injunction (the first application), the company secretary of the ninth defendant e-mailed a notice of a board meeting to be convened the day after, on 18 May 2016. No agenda of meeting was however given. The plaintiff claimed that the e-mail was sent to him at 8.08pm to seek attendance at a meeting scheduled at 11am the day after. On 18 May 2016 the plaintiff responded to decline the invitation, citing unavailability at such short notice and in the absence of any meeting agenda.

[22] On 18 May 2016, being the deadline to submit the regularisation plan to Bursa Malaysia, the sixth defendant (the Group CEO) informed the Board that Bursa Malaysia wished to meet the Board of Directors and Mercury, as the sponsor, at 3.30pm on the same day. The plaintiff contended that at the meeting, the second, fourth and sixth defendants indicated that the Board would apply for an extension of time if funding for the regularisation plan could be secured. In response to a query by Bursa Malaysia, according to the plaintiff, Mercury expressed the view that the Board should apply for the extension of time in the circumstances but acknowledged that the final decision would still lie with the Board. Bursa Malaysia then informed all present at the meeting that any application and/or announcement must be made before midnight of 18 May 2016 itself.

[23] On the same day of 18 May 2016 Bursa Malaysia replied to the plaintiff's unilateral letter/application dated 16 May 2016 seeking the extension of time, stating that it would not consider the same by reason of the lack of mandate and authorisation from the Board of the ninth defendant company. Still on the same day, the plaintiff then e-mailed the Board of Directors, stating his commitment to advance funds up to RM1.5 million to fund the regularisation plan, upon certain terms. This was on the same day later responded to by e-mails by the sixth defendant, and supported by the fourth and seventh defendants, that the money be deposited in a bank account. The reply by the plaintiff insisted that he had already given his commitment on the funding and asked that the Board put in the extension letter to the stock exchange. The sixth defendant then instructed that an announcement (as drafted earlier by Mercury) be released to Bursa Malaysia, stating the non-making of an extension of time to submit a regularisation plan. The plaintiff had stated his disagreement with the announcement since it did not refer to his proposed funding commitment.

A **Evaluation And Findings By This Court**

Ex parte Order For Appointment Of Receiver And Manager

[24] The power of the High Court to appoint a receiver is provided under the Courts of Judicature Act 1964 ("CJA"), para. 6 of the Schedule pursuant to s. 25(2). A receiver may be appointed by the High Court under O. 30 r. 1(1) of the Rules of Court 2012 ("the RC 2012"). Under Order 30 r. 1(2), an application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order. This was what the plaintiff did in his encl. 3, which included the alternative prayer for a grant of an injunction pending the disposal of the application for the appointment of receiver and manager. The plaintiff also made the receiver application *ex parte*, but this is only allowed under O. 30 r. 1(3) in situations requiring the immediate grant of an injunction. The RC 2012 do not refer to the application for the appointment of receiver and manager itself to be made *ex parte*, and based on case law authorities, it can be considered settled law that *ex parte* applications for a receiver and manager should not to be granted except sparingly in great caution, in the case of extreme emergency, where the circumstances are considered as extraordinary (see Australian case of *Bond Brewing Holdings Ltd v. National Australian Bank Ltd* [1990] 8 ACLC 330, and *Sek Ann Thong v. Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor* [1997] 1 CLJ Supp 239, and *Ho Chee Kheong & Anor v. Megaleap Development Sdn Bhd & Ors* [2011] 2 CLJ 835).

[25] In fact there is authority to state that the application for the appointment of a receiver and manager can only be made *inter partes*. In *United Engineers (M) Bhd v. Seow Boon Cheng & Anor* [2001] 6 CLJ 190; [2001] 6 MLJ 511, the High Court held that in respect of O. 30 r. 1(4):

> (1) The existence of the words 'until after the hearing of a summons for the appointment of the receiver' in O. 30 r. 1(4) of the RHC would denote that the receiver can only be appointed based upon an *inter partes* application. Only applications for injunctions 'ancillary or incidental to an order appointing a receiver' may be made by way of *ex parte* applications, and the appointment of the receiver *per se* does not fall within the contemplation of those words (see pp. 527G, 528A).
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> (2) The application has also to be heard *inter partes* because it is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem* (see pp 528H-I, 529B-C). (emphasis added)

[26] It was also for this reason that whilst I agreed that the urgency may be argued to be in relation to the deadline for the submission of the extension letter, *vis-à-vis* the threat on the removal of the listing status, given the need for great circumspection demanded of applications for appointment of

receiver and manager, I directed that the relevant cause papers, notwithstanding contended to be *ex parte* by the plaintiff (despite not stated as such in encl. 3), be served to the defendants to notify them of the hearing the day after.

Test For Appointment Of Receivers And Managers

[27] Appointments of receivers are in this context invariably with the objective of protecting the properties of a company, and can also be made pending resolution of disputes between shareholders and directors, which have the effect of preventing its affairs from being carried on properly, especially resulting in situation of deadlock in management.

[28] In *Federal Transport Service Co Ltd v. Abdul Malik & Ors* [1973] 1 LNS 28; [1973] 1 MLJ 216, the High Court made an order for the appointment of a receiver and manager where there were serious disputes among shareholders of a company and where the assets of the company were in jeopardy. However in the instant case, it cannot be said that there is a dispute that results in any deadlock-like situation for the stance not to apply for the extension was a decision taken by a clear majority of the members of the Board of the ninth defendant company.

[29] It is equally well-established that where appointment is applied for like in the instant case for what the plaintiff asserted for the interim preservation of property pending determination of the writ action, the courts would have to be satisfied that:

(i) there is a good *prima facie* claim of title by the applicant;

(ii) the property is in jeopardy; and

(iii) the applicants will be in a worse situation if the appointment of a receiver is delayed.

[30] These principles have been applied in cases such as *Lim Poh Choo v. Absolute Ascend Sdn Bhd* [2008] 7 CLJ 810; [2008] 3 MLJ 740 and *Saling bin Lau Bee Chiang v. Kanawagi a/l Seperumaniam* [2010] 8 CLJ 347. It was also followed in *Matang Holdings Bhd & Ors v. Dato Lee San Choon & Ors* [1985] 1 LNS 42; [1985] 2 MLJ 406, where an application to appoint a receiver under O. 30 was declined by the High Court for the reason that it was speculative for the plaintiff to contend that the directors of the company would abuse their powers due to the wide ranging provisions contained in the memorandum and articles of association of the company without any further evidence to show that there was mismanagement or that the assets of the company were in jeopardy.

[31] I agree with the submission of the plaintiff that it is possible to appoint a receiver and manager over a public company, such as shown in the authorities cited by the plaintiff, namely the Hong Kong High Court decision in *Securities and Futures Commission v. Qunxing Paper Holdings Company Limited & 3 Others* [HCA 2428/2013] and the Supreme Court of Western Australia decision in *Jenkins v. Enterprise Gold Mines NL and Another* [1992] 6 ACSR 539. However, I do not agree that based on what is available before this court at the hearing namely plaintiff's pleadings in the statement of claim as well as his averments in his affidavits, the plaintiff has satisfied this court for reasons discussed in the rest of this judgment that he has shown that there is a good *prima facie* claim of title by him, or that a certain property of the ninth defendant is in jeopardy or that the plaintiff would be in a worse situation if the appointment of receiver is delayed.

Ad Interim Injunction

[32] Although the plaintiff at the hearing requested for an *ad interim* injunction for an EGM be directed to be convened and that the directors be required to submit the extension letter to Bursa Malaysia, these are in substance and effect what the plaintiff sought to achieve in his application for the appointment of the receiver and manager in encl. 3. In the receiver appointment application, the plaintiff sought among others that the receiver be given specific directions to have all powers to take steps necessary to avoid the shares of the ninth defendant being delisted. In the injunction request, the directors were to be compelled to pursue the regularisation plan by submitting the extension letter. Thus on this basis alone, the request for injunction falls short on substance.

[33] Equally fundamentally, these *ad interim* orders are in the nature of mandatory injunctions. It is well settled in law that courts will only, *albeit* reluctantly, grant such orders if the applicant has discharged the higher standard of proof where a strong case for its grant has been established. In *Gibb & Co v. Malaysia Building Society Berhad* [1982] 1 CLJ 185; [1982] CLJ (Rep) 99; [1982] 1 MLJ 271, Abdoolcader J (as he then was), delivering the judgment of the former Federal Court held instructively as follows:

> Before we deal with the issues raised we should perhaps touch on a point made by Mr. Sri Ram for the appellant in referring to the judgment of this court in *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 2 MLJ 109, 114 restates *inter alia* that *an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (Canadian Pacific Railway v. Gaud [1949] 2 KB 239 249 (at p. 249))*, but there is no reason why interlocutory or indeed interim mandatory

injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order. Fry LJ, said in *Bonner v. Great Western Railway Company* [1883] 24 Ch D 1 10 (at p. 10): "I have no doubt of the jurisdiction of the court to grant a mandatory injunction on interlocutory applications as well as the hearing." *The case however must be 'unusually sharp and clear' (Shepherd v. Sandham [1971] Ch 340), and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend inter alia upon considerations of hardship to the parties.* (emphasis added)

[34] A similar approach was adopted by the Court of Appeal in *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566; [2002] 1 MLJ 33 where Alauddin JCA (as he then was) held thus:

In an application for a mandatory interlocutory injunction, the applicant will have to show that they have an unusually strong and clear case and that there are special circumstances before the court will grant them relief. This test was approved by the English Court of Appeal in *Locabail International Finance Ltd v. Agroexport*. The rationale for this test is simple to understand. Since the relief of mandatory injunction sought in an interlocutory application would be the primary relief of the applicant in his main action, the applicant must convince the court to its satisfaction that he indeed has a high degree of success at the trial of his action.

[35] I am not convinced that the instant case is one such exceptional or rare cases which justifies the granting of a mandatory injunction. There are no special circumstances either, nor has the plaintiff shown he has a high degree of success at trial of the main action. Far from being an unusually strong, clear and sharp case, I find the request for an interim injunction pending hearing of encl. 3 on the appointment of receiver and manager, which in turn is designed to retain *status quo* before trial of the main action as pleaded in the statement of claim to be the exact opposite; for it is riddled with a fair degree of incoherence and inconsistencies, largely for the same reasons why the receiver application could not succeed, as I discuss next in this judgment. An incongruity that I raised at the hearing of both applications was that whilst the whole issue concerning delisting came about from the classification by Bursa Malaysia of the ninth defendant as a GN3 Company (in turn due to the ninth defendant having triggered the GN3 criteria among others, in para. 2.1(b) of the GN3 Criteria and Obligations of GN3 Companies of the ACE Market Listing Requirements on incurring a loss in any one full financial year which exceeds its shareholder equity where the shareholder equity is less than 50% of its issued capital), thus now resulting in the disagreement whether delisting should be avoided by the submission of a regularisation plan to Bursa Malaysia (and for an extension letter to be submitted prior to that), the plaintiff is now strenuously arguing for the appointment of a receiver and manager over the asset of the ninth defendant.

However, pursuant to para. 2.1(d) of the same GN3 Criteria and Obligations of GN3 Companies of the ACE Market Listing Requirements it is specifically stated that any such appointment would trigger yet another GN3 classification. Counsel for the plaintiff did not offer a satisfactory answer to this point. The disingenuous circularity of the plaintiff's position could thus not have been more stark.

What Is The Property In Jeopardy & In Need Of Protection?

[36] Of central importance to any application for the appointment of receiver and manager in the context relevant to this case, and any injunction application ancillary thereto, both of which surfaced in encl. 3 in the instant case, must be the property that is claimed to be in jeopardy and thus required preservation. It is trite that the property over which the receiver and manager is appointed must be identified and described in the order itself or by reference to the pleadings or documents where details of the property are set out. However it will be readily recalled that encl. 3 made reference to two points of relevance. First, the receiver was proposed to be appointed over the entire undertakings and assets of the ninth defendant company. Secondly, the grounds stated in encl. 3 to support such application is almost unmistakably wholly concerning the need to preserve only the listing status of the ninth defendant company.

[37] I find this to be wholly disproportionate, if not patently irreconcilable at the same time. It is difficult to fathom how a concern about the possible loss of listing status could justify a receiver and manager be appointed over the entire undertaking and assets of the ninth defendant company. If the argument was really more on the alleged mismanagement of the ninth defendant by the director defendants, this is at this stage not apparent and entirely unproven based on the affidavits and pleadings by the plaintiff.

[38] In any event, what exactly are the assets of the ninth defendant requiring protection in the instant case? Enclosure 3 is silent on this apart from the grounds in support of the application which refer to the listing status of the ninth defendant. The grounds specifically provided that the intervention by this court to appoint the receiver and manager over the entire assets of the ninth defendant and to manage the ninth defendant "is necessary because if Bursa Malaysia were to delist SCAN shares on 18 May 2016, all SCAN shares would be rendered worthless." Further, it was stated that without the intervention, "SCAN's assets would be in jeopardy … if SCAN shares were to be delisted by Bursa Malaysia …"

[39] It is thus clear as daylight that the concern, in fact the one singular issue of concern of the plaintiff is resolutely being the preservation of the listing status of the ninth defendant. That is also in effect for all intents and purposes the 'property' said to be in jeopardy. The affidavits and pleadings

by the plaintiff have not identified any other property of the ninth defendant that is in any manner similarly in jeopardy, either at the risk of being dissipated or destroyed. And it is also unmistakable that as a result, for some reason according to the logic of the plaintiff, a receiver and manager ought to be appointed over not the listing status of the ninth defendant (if at all it was conceptually possible for a receiver to take control of the listing status in the first place – see further analysis on this below), but inexplicably in respect of the entire asset and undertaking of the ninth defendant company instead.

Listing Status Not The Property Of The Ninth Defendant Company

[40] The crux of the case of the plaintiff is that a receiver and manager ought to be appointed as the asset of the ninth defendant is in jeopardy. That asset is said to be the listing status of the ninth defendant. I expressed my reservation during the hearing whether this point of view was tenable. The plaintiff submitted on two Hong Kong case-law authorities. In the Hong Kong Court of Appeal decision in *Luck Continent Ltd v. Cheng Chee Tock Theodore & Ors* [2013] 5 HKC 442 it was stated thus:

> 86. What are the terms on which the parties agreed to do business together? More precisely, in the context of a listed company, what are the terms on which the shareholders acquired the shares of the company? In my view, in the context of CYF, one of the fundamental terms must be that it should maintain its listing status. That must be the common understanding of all the shareholders when they acquired the shares of CYF. That common understanding can properly be described as a common understanding *inter se* between the shareholders.
>
> 87. Applying Lord Hoffmann's cross check, I ask myself whether the Respondent Shareholders' exercise of their voting power was contrary to what the parties, by words or conduct, have difficulty in answering in the affirmative. The blocking of the amendment of the Bye-law would prevent the resumption of trading of the shares and jeopardise the listing status of the company. The shareholders would be locked into the company (with no exit through the market due to the suspension of the trading) which was not what they had bargained for.

[41] The Court of Appeal thus found that the blocking of the amendment to the by-law to facilitate the resumption of trading of the shares of CYF was unfairly prejudicial for it constituted a breach of a fundamental understanding between the shareholders in associating together, the maintenance of the listing status being the premise on which all shareholders acquired CYF shares. The by-law was thus ordered to be amended and decision of the High Court affirmed. It was clear that the by-laws was in violation of the listing Rules which required that removal of directors be sanctioned by a general instead of a special resolution, and that if and unless amended, the suspension (due to another reason) would remain un-lifted, putting the listing status in jeopardy.

[42] In another Hong Kong case submitted by the plaintiff, *Re Rhine Holdings Ltd (in liq)* [2000] 3 HKC 543 concerning a scheme of arrangement, the High Court made the following statement:

> The only reason for the exchange of shares is that it will enable the investor to take advantage of the 'Introduction' mechanism for listing. It is thus not the shares of any company in liquidation that would be of interest to the investor: only the securities of a listed issuer would be of interest. But the ability to facilitate or the facilitation of a listing of the investor or its company is derived from the fact that Rhine is a listed company. In my judgment, that ability or facilitation is a corporate asset.

[43] It is thus the contention of the plaintiff as expressed in oral submission at the hearing, that the listing status is a form of corporate property that was then in jeopardy, the preservation of which would be imperative, justifying the appointment of the receiver and manager, or alternatively on an *ad interim* basis, an injunction to compel the Board to make the extension application to the stock exchange.

[44] I am however not persuaded that these Hong Kong cases support the contention of the plaintiff. Firstly they do not involve the issue of appointment of receiver and manager and neither do they concern the argument on the asset of a company being in jeopardy thus necessitating the appointment of receivers and managers. Secondly, they do not establish that a listing status is an asset of the company. It is rudimentary that in corporate finance, a listing refers to the company's shares being on the list of shares that are officially traded on a stock exchange. Adherence to the relevant listing requirements of the applicable stock exchange is a necessary prerequisite to admission and continued listing.

[45] These generally include having the requisite profit track record, size of capital and presence of a certain free float threshold. In Malaysia, the stock exchange grants listing status (separate from the approval to be obtained from the Securities Commission of Malaysia ("the SC") under s. 212 of the Capital Markets and Services Act 2007) on the basis of the contractual relationship between listed issuers and the exchange (the issuers executing an undertaking to comply with the listing requirements, if granted the listing status). Under the securities laws, the stock exchange has the powers to take action against infringements of its listing requirements. So too can the SC, as the securities regulator. Non-compliance also risks the removal of the listing status.

[46] It should thus come as no surprise if one is to submit that a listing status cannot be construed as a property of the listed issuer company or its shareholders. And is certainly not one which risk of delisting justifies the appointment of a receiver and manager. That it may well be a common understanding amongst shareholders that the shares remain listed does not

turn the listing status into a property of the company or its shareholders. The status continues for as long as there is compliance with the listing requirements and there are no grounds for delisting to occur. The company's right to it is largely contractual, and more appropriately described as being dependent on its compliance with the listing requirements. It may even amount to a privilege. But it cannot validly be stated to be the property of the company. There is certainly a value to be attached to it, in the form of a readily ascertainable market price for as long as the status remains, since it permits trading of the shares on the exchange, but it would be misconception to say that the listing status is thus a corporate asset of the company.

[47] It is certainly erroneous and misleading for the plaintiff to have stated that the delisting would render the shares of the ninth defendant company worthless since that is patently untrue. The delisting does not equate with a cessation of business, and certainly is not the course of action proposed by the directors of the ninth defendant company, moving forward.

[48] The announcement made by the ninth defendant company (see further below) clearly demonstrates that the company would continue its focus on its core business operations. Holders of the shares of the company would not be holding shares which are worthless. The shares merely do not have readily available stock market price. But they undoubtedly are still worth a price, which can be valued other than based on market price, such as by making it referable to the valuation of the company on net tangible asset or discounted cash flow bases.

[49] Furthermore, there is no denying that a listed issuer cannot sell or transfer its listing status. A transfer could be implemented however, if done as part of a corporate restructuring, but even then must be accompanied by regulatory approvals. The listing status thus does not *per se* belong to the company, the shareholders or any other party to start with. A conduct which stymied efforts to amend internal regulations to ensure harmonisation with the listing requirements and remove risk of delisting such as found in *Luck Continent Ltd* may be unfairly prejudicial but that finding is not premised on the proposition that the listing status is a property of the company, but instead simply means that the understanding of shareholders that their shares should remain listed was violated.

[50] Delisting on the other hand involves the removal of a stock of a company from the list of the stock exchange, resulting in non-ability of shareholder investors trading in shares of the company on that exchange. Delisting may occur not only as an enforcement action by the stock exchange following violation of listing requirements, but may also happen almost voluntarily by the listed issuer deciding to become a private company or simply by reason of wishing to reduce regulatory reporting complexities and compliance costs.

[51] Delisting does not have to even mean a change in a company's core business strategy. The business operations of the company may continue as usual, only that a readily available value of the shares in the company is now lacking. But there are more non listed companies than there are listed, and there have been a number of situations where previously unlisted companies sought to be delisted, and there was also a precedent that a company which asked to be delisted subsequently applied for and allowed to be re-listed.

[52] As such, since the purported asset of the ninth defendant that allegedly needed protection is not an asset owned by the company as recognised by law, or in any event, not a form of 'property' that could justify the entry of a receiver and manager over the entire assets and undertaking of a company, the plaintiff has not shown what is the property that is in jeopardy to justify the order for the appointment of a receiver and manager as stated in the cases such as *Lim Poh Choo v. Absolute Ascend* and *Matang Holding Bhd v. Dato Lee San Choon* which I referred to earlier. The very basis and rationale for the application of the appointment of a receiver and manager and consequently the other reliefs related thereto, must therefore necessarily fail.

Lack Of Substantive Nexus Between Receiver Application And Main Claim

[53] Like most similar applications, the very nature of the application to appoint a receiver and manager in the instant case is manifestly interim, and is designed to maintain *status quo* of certain asset pending the hearing of the underlying action. It can thus be stated that in such a situation a proposition to be applied is that there must be a substantive connection between the property sought to be preserved in the receiver application and the reliefs prayed for in the main action. In the instant case, encl. 3 speaks much of the need to protect the listing status as the *raison d'etre* of the proposed appointment. The statement of claim of the plaintiff on the other hand however focuses on the alleged wrongdoing of mainly the director defendants in the form of deceit, misrepresentation, conspiracy and breach of fiduciary and statutory duties, among others.

[54] Consequently therefore, as stated earlier in this judgment, the reliefs claimed for include declarations on the various alleged violations and for damages. They do not however include any relief against the ninth defendant company. This is unsurprising since there are in fact no allegations of wrongdoing pleaded by the plaintiff against the ninth defendant who may be deemed as a nominal defendant in these proceedings. What I however find incongruous is that the premise for the appointment of receiver and manager application bears little relevance to the claims contained in the main suit filed by the plaintiff. What the plaintiff purportedly seek to protect *via* the receiver application has little to do with the true reliefs he had pleaded in the statement of claim.

[55] If the allegations against the defendants sans the ninth defendant on the alleged wrongdoing can be proven, the issue of whether or not the listing of the ninth defendant is maintained is almost irrelevant and of no consequence. Preserving the listing status has got little to do with proving the claims of the plaintiffs against the other defendants. The receiver application does not raise a sufficient basis to establish the requisite nexus with the writ action. This thus suggests the lack of substance, on the facts and under the law, in respect of both the first and the second applications.

No Prima Facie Claim On Title

[56] On the same footing, based on the pleadings in the statement of claim as highlighted earlier in this judgment, it can thus be readily concluded that the plaintiff has no *prima facie* claim on the title of the property of the ninth defendant because (quite apart from the issue of identity of property in jeopardy and the listing status not being a property) the former is clearly not in actual fact seeking any form of final relief against the latter. It is not making any claim against the asset of the ninth defendant. Thus the plaintiff fails to satisfy the test for the granting of the order of an appointment of receiver and manager as stated in above mentioned cases such as *Lim Poh Choo v. Absolute Ascend* and in *Matang Holding Bhd v. Dato Lee San Choon.* And it is also manifest that the plaintiff's stand on this point is spurious for as a shareholder, he has in the first place no right over the property of the ninth defendant company (see *Ng Yong Long v. Qua Hock Leong* [2006] 1 LNS 195; [2006] 4 MLRH 729).

Damages An Adequate Remedy And No Worse Off Position

[57] Furthermore, it is quite clear that the principal relief prayed for by the plaintiff in the underlying action is damages. This is unsurprising since the dispute is essentially concerning shareholding and the purported threat of loss of value in relation to the alleged mismanagement and possible delisting. The plaintiff can be said to be concerned with monetary yield. In the circumstances, damages should rightfully be considered as an adequate remedy. This thus fortifies the challenge against the order for the appointment of a receiver and manager on the basis that since such appointment being an equitable remedy, and as damages are adequate, the court would not be readily moved to exercise its jurisdiction to grant such remedies (see *Bond Brewing Holdings Ltd v. National Australia Bank Ltd* [1990] 1 ACSR 445), in much the same way it is settled law that the courts would be reluctant to grant any interlocutory injunction order for the same reason of adequacy of damages.

[58] Nor, in my view, would the plaintiff be in a necessarily worse off position if the appointment is delayed, such as if the shares get delisted. This is because delisted shares are devoid of only stock market ready price tradability and not render them worthless. The fact that shares are quantifiable further suggests damages are measurable and ought therefore to be adequate. There is no allegation that the defendants are incapable financially of paying damages if so ordered. On the whole, the application for the appointment of a receiver and manager, on *ex parte* basis in respect of encl. 3 in the first application and on *ad interim* basis in encl. 15 in the second application are entirely bereft of merit and cannot be sustained. This conclusion is supported by what I consider as further justifications as I discuss below.

Management Powers Statutorily Vested In The Directors

[59] Can the decision of the Board in the instant case which had refused to seek further extension for submission of a regularisation plan to the stock exchange be said to be unwarranted and had violated the understanding that the shares of the company ought to remain listed? My answer as I mentioned during the hearing, is resoundingly in the negative. The concerns expressed by the plaintiff, challenging the decision of the board not to submit the extension letter (and therefore risk delisting) cannot legitimately seek to interfere, what more reverse a valid exercise of powers statutorily vested in company directors. It should also be mentioned that the issue of any decision made by the Board of Directors simply did not arise in the Hong Kong case of *Luck Continent Ltd* referred to by the plaintiff for the challenge was against the conduct of the minority shareholders who blocked the passing of the relevant resolution, which conduct could lead to the delisting of the company.

[60] The decision in the instant case on whether the extension letter ought to be submitted and whether there is a sound regularisation plan is eminently within the purview of company management, which is firmly vested in the Board. In this regard, the important rule in company law on the non-overlapping division of powers between directors and shareholders in the administration of companies must be emphasised.

[61] Counsel did not highlight the relevant provisions as may be contained in the memorandum and articles of association of the ninth defendant but I would readily make reference to the more pertinent s. 131B of the Companies Act 1965 which codified this common law rule pursuant to the Companies (Amendments) Act 2007 which had been introduced to enhance the framework on the duties and powers of directors under the law. It is worthy of emphasis that s. 131B states as follows:

(1) The business and affairs of a company must be managed by, or under the direction of, the board of directors. A

(2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company. B

[62] This provision reinforces the principle that the law and the articles divide the powers of the company between the directors and the shareholders, and the latter cannot under the law direct the former on how to exercise the powers properly within the remit of the directors as stipulated in the articles. I need only refer to the passage from the judgment of Lord Wilberforce in delivering the opinion of the Privy Council in the case of *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821 which made the point so clearly as follows: C

The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management ... it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office. D E

[63] In the instant case, the plaintiff is a director and shareholder of the ninth defendant company. He disagreed with the stance taken by the majority of the Board. At the time of filing this action, the plaintiff held about 7.791% of the share capital of the company. He did not say that the majority of the shareholdings in the company wished to seek an extension for he could not speak on their behalf. There are in fact no other suits instituted by any other shareholders of the ninth defendant company, despite the plaintiff contending that the assets of the company, and in particular its listing status should be preserved, and the threat that shares could be worthless or adversely affected by a possible delisting. In fact there is no evidence of any complaints from any other shareholder. No less significantly, the fourth defendant is another substantial shareholder, holding 6.19% and is also a director on the board who, in contradistinction, strongly supported to move not to pursue extension. F G H

[64] The appointment of a receiver by the court over the entire assets and undertaking of a company like what is sought by the plaintiff in the instant case would practically mean that the directors will be *functus officio* until the receiver and manager hands back the company. Lord Atkinson in the House of Lords decision in *Moss Steamship Co Ltd v. Whinney* [1912] AC 254 made it clear that: I

> This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company … Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

[65] As such, since the receiver and manager would become entitled to exercise the company's powers, the directors' authority is suspended in relation to the assets covered by the receivership, which in the instant case, is proposed to be in respect of the entire business undertaking of the ninth defendant company.

[66] The first application had asked for the appointment of a receiver and manager on an *ad interim* basis and alternatively, for the director defendants be restrained from continuing to manage the company. There is absolutely no basis in law and on the affidavit evidence or the pleadings by the plaintiff that can avoid rendering such application to be entirely devoid of merit and wholly unsustainable. The courts cannot countenance a request to dispossess the powers of management vested by statute in the directors from managing the company unless supported by evidence in situations recognised under the law such as the criteria for receiver application referred to earlier. The instant case is not such a situation that the law envisages sanction for the displacement of Board authority from the exercise of management powers. There is nothing of any acceptable substance that could be said to be evidence of mismanagement, or of the exercise of directors powers being for improper purpose, or not in the best interest of the company, or otherwise constituting a breach of the directors' statutory and fiduciary duties. The available evidence does not even half reach the threshold of *prima facie* to justify judicial intervention. Nor does the assessment on the balance of convenience or the balance of justice lean in favour of the plaintiff.

[67] It is a general principle of company law of supreme importance that the powers of the directors can only be displaced or suspended on clear legal basis. An averment that the listing status of the company must be protected and preserved, when the status itself is not a property of the company, and where what is at stake was more the shares held by shareholders (which by definition are also not the property of the ninth defendant company), particularly the shares of the plaintiff himself (and where there is no evidence of any other shareholder complaining; and the fourth defendant too forming part of the majority deciding to risk delisting despite being a substantial shareholder himself), and associated with unproven allegations of misrepresentation and deceit in the underlying writ action, cannot in my judgment constitute any form of justification for the order being applied for,

which asked for a receiver and manager be appointed in place of the director defendants, or alternatively for the latter be restrained by injunction no less, from exercising their statutorily vested powers of management.

[68] As stated earlier, at the hearing, counsel for the plaintiff also orally applied for an *ad interim* injunction order for an extraordinary general meeting of the ninth defendant company be directed to be convened, to allow the decision on the regularisation plan be considered by the shareholders, and for the extension of time be compelled to be made to the stock exchange. This was not even specifically mentioned in encl. 3, and in any event for the same reasons that I found it was not a proper case for the receiver and manager be appointed, I am far from being persuaded that the decision on the regularisation plan would properly fall within the remit of the shareholders when the directors have already clearly decided not to pursue the same. Otherwise it would tantamount to a form of an abdication of directors powers, and constitute a flagrant breach of the clear dichotomy of powers between directors and shareholders, a sacrosanct principle in company law that in my view should remain inviolable.

[69] Similarly, granting a mandatory injunction to compel the submission of an extension letter despite the Board having decided, on reasoned grounds, not to do so, would be contrary to established principles in the absence of a serious question to be tried (even on the strength of the affidavit affirmed by the plaintiff alone), where damages is an adequate remedy (since the issue concerns shareholding, and the plaintiff could still sell his shares and claim damages), and where the balance of convenience and maintenance of *status quo* plainly do not favour the plaintiff. This is not to mention (again) of the higher threshold for the granting of a mandatory injunction which the plaintiff in my view falls very short on.

[70] Whilst this stage of the proceedings is only concerning an application for an *ex parte* order for appointment of receiver and manager and for an *ad interim* injunction in the first application, as well as for the second application which concerns an application for an *ad interim* receiver application, where the affidavits in reply from the defendants have yet to be available, I am firmly of the view, considering the totality of the affidavit evidence before this court and the circumstances of the case, and especially the legal position governing the issues in contention, that it would not serve the ends of justice and certainly not be a proper exercise of judicial power for this court to grant the *ex parte* appointment or the *ad interim* injunction as requested by the plaintiff in the first and the *ad interim* receiver appointment in the second applications.

Decision Of The Board Not To Pursue Extension Is A Business Judgment

[71] In addition, the decision not to seek extension is in my view a form of business judgment under the law, which thus further protects the directors and should not to be interfered with. This is what the provision provides:

Section 132. As to the duty and liability of officers.

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

(1A) A director of a company shall exercise reasonable care, skill and diligence with-

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

Business judgment

(1B) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:

(a) makes the business judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the business judgment;

(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) reasonably believes that the business judgment is in the best interest of the company.

[72] Business is a venture designed to reap rewards in terms of profits. But such undertaking carries risks of losses and failures. Where such enterprise is undertaken by corporate entities, their Boards of Directors should rightfully thus be protected for making erroneous business judgments which may also go horribly wrong provided the decision in question was arrived at honestly, responsibly and in any event for the best interest of the company. Investors must thus expect a risk of loss, as well as an expectancy of profits on the basis of the wisdom of business and management decisions.

[73] A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director (a) makes the business judgment in good faith for a proper purpose; (b) does not have a material

personal interest in the subject matter of the business judgment; (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and (d) reasonably believes that the business judgment is in the best interest of the company.

[74] The definition of "business judgment" in s. 132(6) states that business judgment means "any decision on whether or not to take action in respect of a matter relevant to the business of the company". This thus covers both acts and omissions in the nature of a business decision.

[75] However, there must in the first place be a decision to take or not to take an action. In short, a decision must be made. It does not protect a director who simply refuses or neglects to carry out his duties. In *Australian Securities and Investments Commission v. Rich* [2009] NSWSC 1229 it was observed thus:

> A director who 'simply neglected to deal with proper safeguards, with no evidence that he even turned his mind to judgment of what safeguards there should be' has not made a business judgment and accordingly cannot invoke the defence … The position in the United States is evidently much the same … The important question is whether the director or officer has turned his or her mind to the matter.

[76] The stance taken by the Board in the instant case, based in particular on the meetings held on 18 May 2016 following the first application, and on 26 May 2016 in relation to the second application clearly constitute an affirmative conduct on the part of the relevant directors arriving at decisions not to submit the extension letter (or consider the regularisation plan) nor seek an appeal against delisting.

[77] In seeking to achieve a fine balance between instilling greater fiduciary accountability and promoting commercial efficiency, the business judgment rule thus offers protection for directors if they have acted in good faith, eschewing any personal interest, and for the benefit of the company. Even though the evaluation on the appropriateness of the decision in question may not be entirely based on the outcome of the same, but also on the process that the directors followed in arriving at their decision, judicial challenge of the merits of business judgments is unwarranted given the absence of what may be deemed as an objective standard by which the correctness of the corporate decision may be measured, considering the various permutations of business opportunities and the related utilisation of commercial resources.

[78] Further, the decisions falling within the ambit of the business judgment rule are varied and many. They may obviously involve truly risky ventures, but they may also extend to human resources, and non-financial matters. The decision not to seek an extension of time to submit a

regularisation plan to avoid the delisting of the shares of a company from the official list of Bursa Malaysia would in my view on all accounts be a significant business decision of the board of the ninth defendant company. It certainly concerns a significant issue not least in respect of how the company is run in the applicable regulatory environment, moving onward.

[79] It is interesting to note that in a Court of Appeal decision in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616, unlike in the instant case, the Board decided to enter into a joint development agreement, the decision which was the subject of the suit, in order to prevent the company from being delisted. The Court of Appeal held that the decision was a business judgment which thus protected the directors, as follows:

> [281] In view of it being a business judgment within the deeming provision of s. 132(1B) of the Act which they made at Ho Hup's board meeting on 16 March 2010, the court should be slow to interfere with it. This deeming provision is a statutory recognition of the common law principle that courts are reluctant to pass judgment on the merits of business decision taken in good faith or to substitute such decisions with their own. It must also not be lost sight of that none of the said directors (D4-D8) had any personal interest in the JDA. There was neither any allegation nor proof whatsoever that they had acted in collusion with the other the defendants to act to the detriment of Ho Hup.
>
> [282] This business judgment deeming provision finds support in Australian High Courts. The following authority supports this principle:
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> [283] In *Harlowe's Nominees Pte Ltd v. Woodside (Lakes Entrace) Oil Co NL* (1968) 121 CLR at p 493, the court said that:
>
> > Directors in whom are vested the right and duty of deciding where the company's interest lie and how they are to be served may be concerned with a wide range of practical consideration and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review by the courts.

[80] In the instant case, it is my view that the decision in the refusal to seek an extension is a business judgment properly arrived at following deliberations made at what I consider to be duly convened meetings of the board in the absence of allegation by the plaintiff of any irregularities. The plaintiff chose not to attend the meeting held in the morning of 18 May 2016, the date the deadline expired in respect of the first application. The complaint by the plaintiff on the absence of meeting agenda, considering the circumstances and urgency of the situation, in my view is not convincing, especially since the sixth defendant (the Group CEO) did in the board WhatsApp group chat respond to the plaintiff that the objective (which must have been very obvious) was to discuss whether the company should apply

for the extension. The plaintiff did attend the meeting which was held after the decision of this court on the same day of 26 May 2016 in respect of the second application.

[81] A majority of the directors of the Board who attended the two meetings decided not to pursue extension or submit an appeal against delisting, respectively. The Board of the ninth defendant has six members. At 18 May 2016 meeting, the four directors who attended (namely the second, fourth, sixth and seventh defendants) decided not to submit the extension letter. The plaintiff and the third defendant did not attend. At 26 May 2016 meeting, the same four directors decided not to submit an appeal against delisting, outvoting the plaintiff who also attended. The third defendant was again absent.

[82] There were also discussions by way of e-mail communication amongst the directors on the very issue of whether the extension should be sought, or appeal against delisting be made before and after the meetings on 18 May 2016 and 26 May 2016. The principal reason for the Board not to pursue is said to be attributed to the costs involved in the preparation and implementation of the purported regularisation plan. It was asserted that the costs involved would likely to further unduly burden the financial health of the company and thus delay efforts to truly resuscitate the fortunes of the company, when there was no guarantee that the plan, even if approved, would materialise as expected, within the timeline into the future. In other words, it would be far better to immediately focus on reviving the operations of the company and not be distracted by efforts to retain the listing status of the ninth defendant.

[83] Crucially, in its announcement to the stock exchange dated 18 May 2016, the ninth defendant stated that in the preceding 12 months the Board had taken among others the following steps to regularise its financial condition:

(i) Review the operations and financials of the Company and assess the Company's capability as a going concern;

(ii) Negotiate with the company's bankers and creditors for the restructuring of the company's debts as well as conduct a rationalization exercise to reduce the Company's cost base, including relocating its operations to a smaller office. The collections and liabilities of the Company were also scrutinized; and

(iii) Ongoing discussions to seek avenues to regularize its accounts as well as exploring various options such as via self-regularization or a reverse take-over of the Company by a white knight.

[84] The announcement made it clear that the stand not to submit an extension letter was taken by way of a majority decision. It further spelt out the reasons for the non-submission, as follows:

(i) The operations and the going concern of the Group's business is critical and is of utmost importance;

(ii) The Company has to meet all fiduciary obligations to all parties involved especially its employees;

(iii) The stigma of the Company's GN3 status has caused a loss of business and is a deterrence for clients to engage SCAN, notwithstanding the satisfactory performance of SCAN in relation to the services that it is engaged for;

(iv) The implementation of the Proposed Regularization Plan involves high cost and risk. In the absence of a listing status, the Company can still carry out business by taking care of the essential expenses like payroll and statutory commitments; and

(v) After reviewing the options available, the Board views that the Company is unable to afford the costs associated with the Proposed Regularization Plan.

[85] In my view, the announcement, as drafted by Mercury in their capacity as the professional financial adviser for the ninth defendant company, and approved by the Board as being in pursuance of its own *albeit* majority decision not to seek the extension for the reasons stated in the announcement, cannot by any shred of imagination be in any manner construed as a decision wrongfully or unlawfully taken by the directors, or otherwise tainted by any improper purpose, driven by personal interest, bad faith or not in the best interest of the company in breach of s. 132(1) or s. 132(1B) of the Companies Act 1965.

[86] The grounds set out by the ninth defendant in the announcement which coincide with the minutes of the board meeting on 18 May 2016 appear to be valid and reasonable and in any event rightfully focusing on the financial and business position of the company, and correctly stating that the business could continue in the absence of the listing status.

[87] The concerns expressed by the board on costs implications cannot be characterised as being not in the best interest of the company. The fact remains that proceeding with the proposed regularisation plan, with all its attendant financial commitments binding the ninth company would still not assure the ninth defendant of receipt of regulatory approvals.

[88] Or even if obtained, as mentioned, the regularisation plan may not necessarily be successfully realised. All these contingencies should rightly constitute legitimate concerns to any discerning board proposing the same to

have taken into account. In such event of the failure of the regularisation plan, the ramifications to the company would likely to be nothing short of disastrous, and chances for true revival would be very much more remote and unlikely.

[89] Even the possible argument that the fourth defendant was driven by his private motivation is not sustainable since despite being a substantial shareholder, he too agreed not to proceed to make the extension application and thus risks delisting of his own shareholding as well.

[90] The decisions were, as mentioned, preceded by a number of meetings of the Board and discussions amongst its members, and it thus cannot be denied that views for and against making the extension application and submission of the regularisation plan must have been expressed and considered by the Board. The fact that the Board may have earlier accepted the plan submitted by Revenue Harvest does not mean the Board could not change its mind after further deliberation, which eventually took place at the meeting on 18 May 2016. Furthermore, based on the minutes of the meeting of the Board on 26 April 2016, the said proposal was only agreed to by the Board on an in principle basis. In any event, the Board clearly never then or thereafter decided to submit the extension letter.

[91] It is noteworthy that directors are additionally entitled to also rely on professional expert advice in the making of the announcement under s. 132(1C) of the Companies Act 1965. It should be mentioned that it did not appear that Mercury had earlier outwardly supported the Board's decision on the matter. But it did recognise that the final say rests with the Board, and had drafted the announcement on the basis of the ninth defendant not pursuing any regularisation plan. In my assessment, based on the affidavits of the plaintiff before this court, there was nothing to show that reliance by the directors on Mercury in respect of the announcement may be construed other than to have been made on reasonable grounds under s. 132(1D).

[92] It should equally be noted that any announcement made to the stock exchange must in the first place be thoroughly verified for it is subject to the prohibition against defective disclosure, as contained in the listing requirements and more importantly, in the securities laws. Section 369 of the Capital Markets and Services Act 2007 provides that a person who knowingly authorises or permits the making of any false or misleading statement to the stock exchange relating to among others, the affairs of a listed corporation commits an offence and shall upon conviction, be liable to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding ten years or to both. Board directors and their professional advisers have been prosecuted for violations of this provision or its predecessor section in the now repealed Securities Industry Act 1983.

[93] Thus, other that the contents of the announcement being, on the face of it, reasonable explanation of commercial considerations and business judgment, the directors must have been aware that any false or misleading information could make them and even their advisers liable to criminal law penalties. It is noteworthy that the plaintiff did not seem to take issue with the contents of the announcement *per se*, but more on the non-inclusion of his proposed funding commitment. This further reinforces the nature and essence of the relevant decisions – which are calls made by directors based on a variety of business considerations, rooted in the reality of commercial life, in pursuit of opening possibilities in the face of limited resources and a host of other ever changing permutations.

[94] I am therefore not in any doubt that the decisions taken by the majority of the members of the Board of the ninth defendant not to submit the extension letter nor appeal against delisting and thus risking delisting of the company is a business judgment within the meaning of s. 132(6) of the Companies Act 1965 and more importantly is thus protected under s. 132(1B) of the same Act.

Summary Of Decisions And Conclusion

[95] In the first and second applications, only the pleadings and the affidavit evidence of the plaintiff were available before the court because these applications was filed on the basis that they required urgent consideration, before the defendants had sufficient time to properly affirm any affidavit in reply. As mentioned, I asked that the defendants be notified of the first application despite clearly being intended by the plaintiff to be purely *ex parte* in nature (even though encl. 3 did not refer to it being *ex parte*).

[96] In the first application, the request for an *ex parte* appointment of receiver and manager was refused and dismissed. Although I accept that under the law, an *ex parte* receiver and manager application may be made in exceptional cases, I do not in the instant case find sufficient evidence of mismanagement that merited the granting of an order. Neither do I find the test for the appointment of a receiver and manager fulfilled. Further, I am of the view that the decision of the Board, as represented by the majority of its members, could be construed as a form of a business judgment and ought not therefore to be interfered with.

[97] The plaintiff's other request, made orally at the hearing of the first application for an *ad interim* injunction to compel firstly the convening of an EGM for members of the ninth defendant to deliberate on the regularisation plan and secondly, for the Board to submit an extension letter to Bursa Malaysia to enable the regularization plan be submitted to the stock exchange (both of which were in the first place not stated in encl. 3) was similarly

declined and therefore dismissed because of substantially the same reasons for my refusal of the *ex parte* receiver and manager appointment. Furthermore, the injunction was mandatory in nature, requiring a higher threshold of evidential support which I find the case of the plaintiff to be considerably lacking in to justify the same.

[98] In respect of the second application, the same request in a long hearing before me for what the plaintiff styled in encl. 15 as an application for an *ad interim* appointment of receiver and manager, this time premised on a claimed new development in the form of the stock exchange imposing a deadline for the delisting to actually take place, too was dismissed, with costs. The grounds for the refusal were similar to those in respect of the dismissal of the *ex parte* order for the appointment of receiver and manager and the interim injunction.

[99] My findings in the second application include primarily that there was insufficient evidence of mismanagement or threat to the property of the ninth defendant. The evidence also did not satisfy the test for the appointment of a receiver and manager, nor in any event justify the management powers statutorily vested in the directors to be displaced by the appointment of a receiver and manager over the entire undertaking of the ninth defendant company, more so on the pretext of retaining the listing status which in my view is not even a property of the ninth defendant (let alone that of any of its shareholders) to start with, and worse still at the same time interfering with a decision of a functioning Board which could be legitimately characterised as a business judgment, and thus ought rightfully to be protected under the law.

[100] The plaintiff's counsel's last ditch effort to apply for the grant of an *Erinford* injunction too was dismissed with costs, as I considered it to be devoid of merit.